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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
GARY WALTER DAVIS,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 77-152

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a \$250 civil penalty for outdoor burning allegedly in violation of respondent's Sections 8.02(3), 8.05(1), and 9.04 of Regulation I, came on before the Pollution Control Hearings Board, W. A. Gissberg (Chairman and presiding) and Dave J. Mooney, convened at Lacey, Washington, on December 15, 1977. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant Gary Walter Davis appeared and represented himself. Respondent appeared by and through its attorney, Keith D. McGoffin. Olympia court reporter Jennifer Roland recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260 has filed with this Board a certified copy of its Regulation I containing respondent's regulations and amendments thereto.

II

On September 12, 1977, the appellant Gary Walter Davis, ignited an outdoor fire at a construction site in Tacoma, Washington. The appellant was constructing a multiple-family dwelling on the site and ignited the fire to dispose of tree limbs cut away to accommodate the erection of the dwelling. The appellant owned the land on which the construction was taking place and upon which the fire was ignited.

III

The appellant ignited his tree limbs on the site of a fire set some two weeks previously by subcontractors who were hired by the appellant. Although the subcontractors' agreement with appellant called for the removal of leftover construction materials from the site, nevertheless such materials had been burned, previously, by the subcontractors. The old fire site therefore contained plywood, sheetrock, remains of caulking containers, beverage cans and other retail. These as well as tree limbs were therefore contained in the fire set by appellant.

IV

Appellant did not apply for, nor obtain, any permit from the

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1 respondent, Puget Sound Air Pollution Control Agency, before igniting
2 his fire. He did contact the Tacoma Fire Department before starting
3 his fire and abided by its requirements.

4 V

5 A minimal amount of flyash from appellant's fire came to rest on
6 neighboring lots. None of the neighbors upon whose lots the flyash
7 fell made any complaint to either appellant or respondent.

8 VI

9 On September 12, 1977, the respondent received a telephoned complaint
10 from one Fred Wagner who resides 200-300 feet from the site of appellant's
11 fire. Respondent's inspector arrived at the site of the fire about one
12 hour after it had been ignited. Although the fire had almost burned
13 out by this time, the inspector observed that the contents of the fire
14 were as described above. Two formal notices of violation were issued
15 and the appellant subsequently received Notice and Order of Civil
16 Penalty No. 3505, imposing a civil penalty of \$250. From this penalty
17 appellant appeals.

18 VII

19 The appellant has no prior record of any violation of the regulations
20 of respondent. The appellant is aware that the respondent restricts
21 open burning.

22 VIII

23 Any Conclusion of Law hereinafter stated which may be deemed a
24 Finding of Fact is hereby adopted as such.

25 From these Findings the Pollution Control Hearings Board comes
26 to these

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 CONCLUSIONS OF LAW

2 I

3 Section 8.02(3) of respondent's Regulation I states:

4 It shall be unlawful for any person to cause or allow any
5 outdoor fire:

6 (3) containing garbage, dead animals, asphalt, petroleum
7 products, paints, rubber products, plastics or any substance
8 other than natural vegetation which normally emits dense smoke
9 or obnoxious odors; or
10

11 In burning plywood, sheetrock, caulking containers, beverage cans and
12 other metal, appellant burned prohibited garbage and also material which
13 normally emits dense smoke. Appellant thus violated Section 8.02(3) of
14 respondent's Regulation I.

15 II

16 Section 8.05(1) of respondent's Regulation I states:

17 It shall be unlawful for any person to cause or allow any
18 outdoor fire other than land clearing burning or residential
19 burning except under the following conditions:

20 (1) Prior written approval has been issued by the Control
21 Officer or Board [of the Puget Sound Air Pollution Control
22 Agency]

23 Appellant had neither a "land clearing" fire nor a "residential" fire
24 as those terms are defined in respondent's regulations. A land clearing
25 fire must consist entirely and exclusively of natural vegetation,
26 Section 1.07(nn), and needs a prior population density verification from
27 respondent if conducted in an urban area, Section 8.06. A residential
28 fire must also consist entirely and exclusively of natural vegetation,
29 or wood, and must be conducted by the resident of a single family
30 residence, Section 8.09. The appellant must therefore obtain a written

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1 permit from the Puget Sound Air Pollution Control Agency where, as here,
2 he is burning on a construction site. This is true not only where
3 appellant's fire contains natural vegetation and garbage, as in this
4 appeal, but also where a construction site fire contains natural
5 vegetation exclusively. In failing to obtain a written permit from
6 respondent before igniting the fire here involved, appellant violated
7 Section 8.05(1) of respondent's Regulation I.

8 III

9 Section 9.04 of respondent's Regulation I states:

10 It shall be unlawful for any person to cause or allow the
11 discharge of particulate matter which becomes deposited upon
the real property of others, . . .

12

13 The section contains certain exceptions which were not shown to be
14 pertinent to this appeal. In discharging flyash onto the lots of his
15 neighbors, appellant violated Section 9.04 of respondent's Regulation I.

16 IV

17 Although the appellant has violated the above three sections of
18 respondent's Regulation I, there are several factors operating to mitigate
19 the penalty. First, the violations committed by the appellant are his
20 first offenses against respondent's Regulation I. Second, the appellant
21 did not place garbage into the fire which he ignited but merely set his
22 fire on top of the garbage improperly left by others. Third, although
23 he obtained no permit from respondent, the appellant made a good faith
24 attempt to comply with law by consulting with his local fire department
25 before starting the fire. Fourth, the amount of flyash deposited on
26 the realty of others was minimal, and there is no evidence that anyone was

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1 disturbed by it. For these reasons, the \$250 penalty imposed should be
2 entirely suspended.

3 v

4 Any Finding of Fact which should be deemed a Conclusion of Law
5 is hereby adopted as such.

6 Therefore, the Pollution Control Hearings Board issues this
7 ORDER

8 The \$250 civil penalty here appealed is affirmed, but is suspended
9 on condition that appellant not violate respondent's regulations for a
10 period of one year from this date.

11 DATED this 19th day of December, 1971.

12 POLLUTION CONTROL HEARINGS BOARD

13 W. A. Gissberg
14 W. A. GISSBERG, Chairman

15 Dave S. Mooney
16 DAVE S. MOONEY, Member

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27 FINAL FINDINGS OF FACT,
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